89-192

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL A. ORBEN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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August 1989

QUESTION PRESENTED

Whether Article 134 of the Uniform Code of Military Justice can be constitutionally applied as written to proscribe the display of non-pornographic material.

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MICHAEL A. ORBEN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Michael A. Orben, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on June 5, 1989.

OPINIONS BELOW

The decision of the United States Air Force Court of Military Review, ACM 25865, was issued on October 23, 1987 and was not published. That decision is reproduced in the Appendix to this Petition. The decision of the United States Court of Military Appeals is reported at 28 M.J. 172 (C.M.A. 1989), and is reproduced in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 10 U.S.C. § 867(h) (Supp. III 1985) and 28 U.S.C. § 1259(3)

(Supp. III 1985). The judgment of the Court of Military Appeals was entered on June 5, 1989.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides:

> Congress shall make no law . . . abridging the freedom of speech or of the press. . . .

Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 834 (1982) provides in pertinent part:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, . . . and shall be punished at the discretion of that court.

Paragraph 87 of Article 134 of the Uniform Code Military Justice (hereinafter U.C.M.J.) provides in pertinent part:

> Indecent acts or liberties with a child.
>
> (b) Elements
>
> (2) No physical contact.
>
> (a) That the accused committed a certain act;
>
> (b) that the act amounted to the taking of indecent liberties with a certain person;
>
> (c) that the accused committed the act in the presence of this person;
>
> (d) that this person was under 16 years of age and not the spouse of the accused;
>
> (e) that the accused committed the act with the intent to arouse, appeal to, or gratify the lust, passions

or sexual desires of the accused, the victim or both; and

(f) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

STATEMENT OF THE CASE

On December 11, 1986, the petitioner was convicted of four separate specifications under Article 134, U.C.M.J., alleging the commission of indecent acts with children under the age of 16. He was acquitted of another specification charged under Article 125, U.C.M.J., which alleged the offense of sodomy with a child under the age of 16.

One of the specifications of indecent acts involved appellant's display of several magazines depicting nude photographs to a twelve year old boy named Eric Hricak. Eric Hricak testified the first time he saw the magazines was when Sergeant Orben showed them to Eric and a friend in a parking lot on Grand Forks Air Force Base, North Dakota. (R. 259). On that occasion the magazine was a *Playboy* magazine. This particular issue featured a pictorial display of the popular rock singer Madonna. (R. 260). He saw pictures of Madonna nude but only from the waist up. (R. 200-201). No genitalia was exposed. Eric Hricak testified that after he looked through the magazine the petitioner put it away. (R. 201). Hricak further testified that at that time petitioner made no sexual or personal overtures towards Eric. The second incident occurred inside petitioner's car while he was driving with Eric. He gave Eric a German magazine showing naked boys and girls "[j]ust standing there." (R. 203). None of the print was in written in English and Eric could not speak or read German. The children in the pictures were

merely standing around and no sexual activity was portrayed. The only thing Eric Hricak recalled petitioner saying after he put the magazines away was "this was all right in Germany and you can get these everywhere and stuff like that." (R. 264). Neither magazine was introduced into evidence at trial. It was the display of these magazines which constituted the indecent acts under Article 134.

At the first level of appellate review the Air Force Court of Military Review declined to discuss or even decide whether the pictures shown to Eric Hricak were pornographic. In affirming this case the Court wrote "to resolve this issue it is unnecessary to enter into a discussion as to whether the published magazines were or were not pornographic." *United States v. Orben*, ACM 25865, 23 October 1987, at 3 (unpublished). In the same vein as the United States Court of Military Appeals would eventually decide, the Court of Review relied on petitioner's intent to establish the indecency of the acts.

The United States Court of Military Appeals granted discretionary review of petitioner's case on the issue of whether the displaying of a non-pornographic magazine to Eric Hricak constituted the taking of indecent liberties in violation of Article 134, Uniform Code of Military Justice. That court affirmed petitioner's conviction.

REASONS FOR GRANTING THE WRIT

This case raises an important question concerning the constitutionality of the military's use of Article 134 to protect children of tender years as it is applied to non-pornographic publications. Under the current interpretation the United States Court of Military Appeals permits a conviction under a law which infringes upon a service member's rights under the First Amendment of the United States Constitution without requiring a carefully drafted law nar-

rowly designed to accomplish that purpose. In this case petitioner was convicted under Article 134, U.C.M.J., 10 U.S.C. 934, paragraph 87, of indecent acts or liberties with a child. That particular paragraph does not define "indecent" but relies instead on the definition of that term as used in paragraphs 89(c) and 90(c) of Article 134, U.C.M.J. Those paragraphs provide respectively:

> 89c. Explanation. "Indecent" language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. The language must violate community standards. See paragraph 87 if the communication was made in the physical presence of a child.
>
> 90c. Explanation. "Indecent" signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.

Thus under military law there is no separate definition of the term indecent as it relates to children. The difference between indecent acts with a child and indecent acts with another (adult) is found only in the maximum sentence of seven years if committed with a child compared to five years if committed with an adult. Otherwise the acts actually constituting the offensive behavior would be the same under either provision. However, the United States Court of Military Appeals rested their opinion on the notion that children deserve more protection than adults:

> In so far as First Amendment rights are concerned, we rely on the Supreme Court's conclusion in *Ferber* (citation omitted) that the right to communicate to

> young children may be restricted. . . . Even adults can be protected against exposure to obscenity; and to hold that a service member may be tried for indecent liberties only if he has a displayed obscene materials to a child is to say that a child can be provided no greater protection than an adult. We do not believe this is sound. Children are entitled to develop without premature exposure to materials which arouse their sexual passions. Consistent with this policy, Eric Hricak was entitled to protection from appellant's display of magazines to him when, as here, the display was accompanied by the proscribed intent.

Orben at 175. While the policy identified by the Court is both justified and desirable, its application by the United States Court of Military Appeals in this opinion is flawed. First, the opinion cites *New York v. Ferber*, 458 U.S. 747 (1982) in support of this policy and in justification of their decision. *Ferber* dealt with a New York law proscribing pictures displaying the lewd exhibition of genitalia *by* children not *to* children. Thus *Ferber* dealt with the protection of children by punishing those who exploit them in a sexual and pervert way. The policy of protecting children from being exposed to sexual material which the Court of Military Appeals sought to assert was actually the same policy addressed by another New York law discussed in *Ginsberg v. New York*, 390 U.S. 629 (1968). In *Ginsberg* this Honorable Court upheld a law prohibiting the sale of material containing photographs depicting female nudity. "The state . . . had an independent interest in the well-being of its youth." *Ginsberg* at 640. *See also Ferber, supra*. This is the problem presented by this case. There exists no law in the military giving children any more protection from pornographic material than adults receive. Yet the United States Court of Military Appeals applies a

more restrictive interpretation of Article 134 vis a vis the First Amendment when children are shown non-pornographic—even non-sexual material. We submit they are not free to apply such a policy in the absence of a Congressional mandate such as a carefully drafted law providing children with such special protection. An indecent act under the U.C.M.J. is by definition pornographic.[1] In this case the United States Court of Military Appeals has expanded that definition to include non-pornographic sexual material if such material is shown to children. In fact the court goes so far as to include all pictures of nudes as being indecent providing the accused held the required intent. They wrote:

> "In our opinion, a display of pictures of nude persons to young children may constitute taking indecent liberties with them if the prohibited intent exists. Thus, even displaying to a child a nude body or an anatomical chart or pictures of nude aborigines in the *National Geographic* magazine might constitute taking indecent liberties, if accompanied, by behavior and language of an accused which demonstrated his intent to arouse his own sexual passions, those of the child, or both."

Orben at 174-175. As defined by the U.C.M.J., an indecent act involves only pornographic material and a petitioner's intent cannot change the character of the material displayed.

Congress certainly is free to pass laws protecting children from indecent acts and to prohibit the display of

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[1] Under the U.C.M.J., Article 134, paragraph 90(c), indecent is defined as obscene. The United States Court of Military Appeals in *United States v. Scott*, 21 M.J. 345 (C.M.A. 1986), has equated obscene with pornographic and adopted the *Miller v. California*, 413 U.S. 15 (1973), definition of pornography.

non-pornographic sexual material to them. However, as the law *now* exists in the military, only the display of pornographic material is illegal. Interpreting Article 134, U.C.M.J., paragraph 87 to prohibit the display of non-pornographic material ignores the requirement that such statutes be specifically designed and narrowly written. See *Ferber, supra.* Such a law would be constitutional but the responsibility of creating it properly lies with Congress not the United States Court of Military Appeals. The Court's ruling prohibits constitutionally protected speech which cannot be made illegal absent a specific congressional mandate. Petitioner respectfully prays that a writ of certiorari be granted so that this Honorable Court can address the misapplication of Article 134, U.C.M.J., which affects the First Amendment rights of over 2 million service members.

CONCLUSION

Article 134, U.C.M.J., prohibits indecent acts. "Indecent" is defined by the U.C.M.J. and United States Court of Military Appeals precedent to mean pornographic. With this case the military has expanded indecent acts to include non-pornographic, even non-sexual material if shown to children. This interpretation affects the First Amendment rights of over 2 million service members.

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August 1989

APPENDICES

UNITED STATES COURT OF MILITARY APPEALS

No. 59,340
ACM 25865

UNITED STATES, APPELLEE

v.

MICHAEL A. ORBEN, SERGEANT, U.S. AIR FORCE,
APPELLANT

June 5, 1989

For Appellant: *Captain Laurence M. Soybel* (argued); *Colonel Richard F. O'Hair* (on brief); *Colonel Leo L. Sergi.*

For Appellee: *Captain Jeffrey H. Curtis* (argued); *Colonel Joe R. Lamport* and *Lieutenant Colonel Robert E. Giovagnoni* (on brief).

Opinion of the Court

EVERETT, Chief Judge:

A military judge, sitting as a general court-martial at Grand Forks Air Force Base, North Dakota, tried appellant on a charge that from October 1, 1985, to November 15, 1985, he committed sodomy with a child under the age of 16 years, in violation of Article 125, Uniform Code of Military Justice, 10 USC § 925, and that he had been guilty of various types of indecent conduct with minors, in violation of Article 134, UCMJ, 10 USC

§ 934. Orben was acquitted of the sodomy but found guilty of all four specifications under the other Charge. These were:

Spec	Summary of Offense
1	From September 15, 1985, to January 11, 1986, he committed indecent acts upon the body of Thomas Thorp, a male under 16 years of age, by placing his hands on his legs, thighs, and private parts and kissing his mouth "with intent to arouse, appeal to, and gratify the lust, passion and sexual desires of" appellant and Thorp;
2	From August 1, 1985, to October 31, 1985, he orally communicated to Mario Perez, a child under 16, "certain indecent language, to wit: that there was no difference between a man's anus and a woman's vagina when sexual intercourse is involved, and if" Mario Perez "were in prison for three years he would make love to a man, or words to that effect";
3	Between July 1, 1985, and August 31, 1985, he took "indecent liberties with Eric Hricak, a male under" 16, "by showing . . . [him] several magazines containing numerous pictures depicting the full body nudity of adults and children, with intent to arouse and appeal to the lust, passion and sexual desires of" Hricak and Orben;
4	Between July 1, 1985, and August 31, 1985, he "committ[ed] an indecent act upon the body of Eric Hricak, a male under 16 years of age . . . by placing his hands on his upper leg, with intent to arouse, appeal to, and gratify the lust, passion and sexual desires of" Hricak and appellant.

The military judge sentenced Orben to a dishonorable discharge, confinement for 1 year, total forfeitures, and reduction to the lowest pay grade. The convening authority approved this sentence; and the Court of Military Review affirmed the findings and sentence. We granted review on these two issues:

I

WHETHER APPELANTS CONDUCT OF DISPLAYING A NONPORNOGRAPHIC MAGAZINE TO ERIC HRICAK CONSTITUTED THE TAKING OF INDECENT LIBERTIES IN VIOLATION OF ARTICLE 134.

II

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE ACCUSED BY NOT FULLY COMPLYING WITH HIS REQUEST FOR SPECIAL FINDINGS.

The offenses of which Orben was convicted all involved dependent children of servicemembers assigned to Grand Forks Air Force Base, where appellant had arrived in July 1985. According to the government evidence, two months later he met Thomas Thorp, then 14 years old, at the video-arcade section of the base bowling alley. Thorp testified that he had seen Orben on various occasions thereafter. On one outing together, appellant had showed him magazines[1] which Thorp described as "dirty" and which contained pictures of totally nude people. Orben had stated that these magazines came from Europe. On various occasions came from Europe. On various occa-

[1] This evidence was offered over objection as uncharged misconduct tending to support the allegations of specification 3 involving Eric Hricak.

sions appellant had grabbed Thorp's inner thigh; and once he had kissed him on the lips.

Mario Perez, a 13-year old whom Orben had met at the video arcade also, testified that he had seen appellant there three or four times a week. Orben had used language like that alleged in specification 2; and on one occasion, he had placed his hand on Mario's thigh and begun to rub it. Also, on one trip, Orben had displayed to Mario three magazines[2]—one of which had on the cover "a naked body" who appeared to be 10 to 12 years old and did not have much pubic hair. In looking through this magazine, Mario had seen several naked people, who ranged "[f]rom very young to about my age and older." About half the picture he saw were of males, and the other half were of females.

Eric Hricak testified that he had been 12 years old when he had met Orben at the video arcade in July 1985. Appellant had taken him to the base movie theater a couple of times. Once while Eric was in appellant's car, the latter had placed his hand on Eric's inner thigh.

On another occasion Eric and a friend of his were sitting with Orben in his car when appellant had produced a *Playboy* magazine and showed it to them. Eric had seen pictures of a woman nude from the waist up. On another occasion, while alone with Orben in his car, appellant had pulled out a magazine which he had stated was German, opened it up, and given it to Eric. He had seen "kids standing there naked" who had appeared "younger than" himself. Their genitals had been fully displayed in the magazine's pictures.

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[2] *See* n.1., *supra*.

I

At trial and on appeal, Orben has contested the sufficiency of the allegations in specification 3 and the evidence offered in its support. In appellant's view, he could not properly be convicted of indecent liberties with Eric Hricak because the magazines which he showed Eric and the pictures therein were not pornographic or obscene. Moreover, appellant insists that showing these magazines to children was constitutionally protected conduct under the First Amendment.

According to the Manual for Courts-Martial, United States, 1984, the crime of taking indecent liberties with a child must be proved by evidence that the accused committed a certain act in the presence of a child under 16 years of age, which amounted to the taking of indecent liberties with the child and was "with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both." *See* para. 87b(2)(e), Part IV. The discussion in the Manual for Courts-Martial, United States, 1969 (Revised edition), was to the same effect. *See* para. 213*f*(3).

In *United States v. Scott*, 21 MJ 345 (CMA 1986), we considered whether showing two young girls "a magazine designed to appeal to the prurient interest" might consitute a violation of Articles 133 and 134, UCMJ, 10 USC §§ 933 and 934, respectively. First, we reaffirmed "that the offense of taking indecent liberties with a child may be committed without any physical contact or touching." 21 MJ at 348. *See also United States v. Brown*, 3 USCMA 454, 13 CMR 10 (1953). Next, we concluded that "showing a child pornographic pictures" can authorize a conviction for "taking indecent liberties" with a child because of the strong "policy of protecting the morals of children." *Id.* at 349 (footnote omitted). Finally, we held that Scott's "first

amendment right to communicate with others" had not been infringed because "the right to communicate to children of tender ages is less extensive than the right to communicate to adults. *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)." 21 MJ at 349.

Because our opinion in *Scott* referred to "pornographic pictures," *see* 21 MJ at 349, appellant now contends that only a display of such pictures constitutes indecent liberties and that a display of pictures which cannot be classified as "pornographic" or "obscene," *see* 21 MJ 349 n. 3, does not constitute taking indecent liberties.

[1] We reject this contention. In our opinion, a display of pictures of nude persons to young children may constitute taking indecent liberties with them if the prohibited intent exists. Thus, even display to a child a nude body on an anatomical chart or pictures of nude aborigines in the *National Geographic* magazine might constitute taking indecent liberties, if accompanied by behavior and language of an accused which demonstrated his intent to arouse his own sexual passions, those of the child, or both.

[2] Insofar as First-Amendment rights are concerned, we rely on the Supreme Court's conclusion in *Ferber* that the right to communicate to young children may be restricted. Thus, courts have upheld various types of statutes and ordinances designed to prevent the exposure of minors to sexually-oriented material. *See, e.g., Upper Midwest Booksellers Association v. City of Minneapolis*, 780 F.2d 1389 (8th Cir.1985); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir.1983). Also, Congress has enacted legislation which limits distribution of pornography to children. Child Protection Act, Pub.L.No. 98-292, 98 Stat. 204 (1984), amending 18 USC § 2251.

[3] Even adults can be protected against exposure to obscenity; and to hold that a servicemember may be tried

for indecent liberties only if he has displayed obscene materials to a child is to say that a child can be provided no greater protection than an adult. We do not believe that this is sound. Children are entitled to develop without premature exposure to materials which arouse their sexual passions. Consistent with this policy, Eric Hricak was entitled to protection from appellant's display of magazines to him when, as here, the display was accompanied by the proscribed intent.

II

At trial, defense counsel requested that the military judge enter a number of special findings. Under Article 51(d) of the Uniform Code, 10 USC § 851(d), and RCM 918(b), 1984 Manual, *supra*, a military judge is obligated to find the facts specially, if he is requested so to do. *See also United States v. Gerard*, 11 MJ 440 (CMA 1981). However, "[s]pecial findings may be requested only as to matters of fact reasonably in issue as to an offense." RCM 918(b).

[4, 5] In our opinion, neither the Code nor the Manual contemplate that a military judge could be required by counsel to analyze in detail the evidence which led to certain findings or to justify the findings which were made. In this case, the defense request (*see* Appendix A) went too far and sought to require the judge to write a brief in support of the findings he had made.

In some instances, the requests were predicated on an erroneous premise. For example, the defense asked the judge: "What evidence did you rely on in determining local community standards as it pertains to 'indecent' verbal communication?" If it were required that the language used by appellant be "obscene" in order to justify conviction on specification 2, it might be necessary for the

Government to prove what the local community standards are—just as it might be required in an obscenity prosecution. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The same observation applies to this defense request for a finding on specification 3: "What evidence did you rely on in determining local community standards as it pertains to written or pictorial materials?" Since it was not necessary for the Government to prove obscenity, denial of these requests was proper.

In our view, some of the requests for special findings were really requests that the military judge recapitulate all the evidence or summarize all the evidence on which he relied. Such requests need not be granted. The findings made by the judge (*see* Appendix B) were sufficent to permit an informed appellate review of this case. Under the circumstances here, no further findings were required.

III

We conclude that the evidence was sufficient to sustain all the findings of guilty; that appellant's First-Amendment rights were not violated; and that no prejudicial error occurred.

The decision of the United States Air Force Court of Military Review is affirmed.

Judges COX and SULLIVAN concur.

APPENDIX A

Concerning Specification 2, Charge II

1. What facts do you find that establish beyond a reasonable doubt that the language in question is "indecent"?

2. What evidence did you rely on in determining local community standards as it pertains to "indecent" verbal communication?

3. What facts establish that the First Amendment right of free speech was not a defense to the specification?

4. What facts establish beyond a reasonable doubt that the specification serves to give a libidinous message?

5. What facts establish beyond a reasonable doubt that the accused's conduct was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces?

Concerning Specification 3, Charge II

1. What facts do you find that establish beyond a reasonable doubt that the accused took indecent liberties with Eric Hricak?

2. What facts do you find which indicate "full body nudity of adults and children" are indecent?

3. What evidence did you rely on in determining local community standards as it pertains to written or pictorial materials?

4. Without viewing the "indecent" materials, what facts establish beyond a reasonable doubt that the materials are indecent?

5. What facts establish that the First Amendment right of free speech/expression was not a defense to the specification?

6. What facts establish beyond a reasonable doubt that the accused intended to arouse and appeal to the lust, passion and sexual desires of Eric Hricak and himself?

7. What facts establish beyond a reasonable doubt that the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces?

Concerning Specification 4, Charge II

1. What facts establish beyond a reasonable doubt that the accused committed an indecent act on Eric Hricak?

2. What facts establish that the touching was not the product of a friendship or horseplay between Eric Hricak and the accused?

3. What facts establish intent to arouse, appeal to, and gratify the lust, passion, and sexual desires of Eric Hricak and the accused?

4. What facts do you find that make the testimony of Eric Hricak truthful?

Concerning Specification 1—Charge II

1. What facts establish beyond a reasonable doubt that the accused committed an indecent act on Thomas C. Thorp?

2. What facts establish that the touching and kissing was not the product of a friendship or horseplay between Thomas C. Thorp and the accused?

3. What facts establish intent to arouse, appeal to, and gratify the lust, passion, and sexual desires of Thomas C. Thorp and the accused?

4. What facts do you find that make the testimony of Thomas C. Thorp truthful?

APPENDIX B

321 SERVICES SQUADRON
GRAND FORKS, AFB, N.D.

UNITED STATES

v.

SGT MICHAEL ORBEN, FR293-64-9661

SPECIAL FINDINGS

Charge II, Specification 1
By Elements

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1. I find that near Grand Forks AFB in September, 1985, the accused placed his hand on Thorp's leg while traveling in the accused's automobile. (R. 40) I find that approximately a week later, still in September, the accused kissed Thorp on the mouth in the restroom of a theatre in the town of Grand Forks near Grand Forks AFB. (R. 50,53). The accused put his hand on Thorp's leg in the same theatre on the same date. (R. 54). He continued this conduct although Thorp moved his leg. (R. 55). Approximately one week later, in October 1985, Thorp again accompanied the accused to town (R. 56), where accused kissed

Thorp on the lips in a pizza parlor bathroom (R. 57). Later the same day the accused kissed Thorp on the lips in a theatre bathroom. (R. 61). The accused put his hand on Thorp's leg on the way home in accused's car. (R. 73).

The accused visited Thorp at Thorp's home in December 1985 (R. 75) and while there grabbed Thorp's penis through Thorp's clothing. R. 76).

The accused visited Thorp at Thorp's in early January 1986 (R. 73-74) where he kissed Thorp on the mouth in the basement. (R. 79).

2. I find that Thomas Thorp was a male person, not the spouse of the accused under the age of 16 years. (R. 36, 38).

3. I find that the acts of the accused, as portrayed upon the entire record were in fact indecent. In so finding I have consulted my common sense and my knowledge of the ways of the world. These acts were depraved, grossly vulgar, obscene and repugnant to common propriety and tended to excite lust and deprave morals with respect to sexual relations.

4. I find upon a reading of the entire record as it pertains to these acts that the intent of the accused was totally unambiguous. I find his intent clearly was to appeal to and gratify the lust, passions and sexual desires of both the accused and his victim, Thomas Thorp.

5. I find that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the service and was of a nature to bring discredit upon the armed forces.

Charge II, Specification 2

By Elements

1. I find that in August 1985, (R. 190) when the victim, Mario Perez, was under the age of 16 years (R-190) the accused spoke to him at the bowling alley on Grand Forks AFB. (R. 191). The accused stated, in effect, that there was no difference between a woman's vagina and a man's anus when sexual intercourse is involved and further stated in effect that if the victim were even in prison for 3 years, he, the victim, would commit anal sodomy also. (R. 192).

2. I find the language was indecent, being grossly offensive to the community sense of modesty, decency or propriety. I find it shocks the moral sense because of its vulgar, filthy and disgusting nature. I find that it is particularly odious to invite a child of tender years to contemplate himself committing anal sodomy. I find language from an adult to a child of tender years, as in this case, suggesting no difference between anal sodomy and heterosexual intercourse to be dangerously indecent in that the child may dwell upon this perverted suggestion and speculate as to its merit.

3. I find that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the service and was of a nature to bring discredit upon the armed forces.

Charge II, Specification 3

By Elements

1. I find that at Grand Forks AFB, N.D. in the period July-August, or early September 1985, (R. 250, 254) the accused showed Eric Hricak several magazines showing full body nudity of adults and children. (R. 259, 262).

2. I find that Eric Hricak was a male person not the spouse of the accused under the age of 16 years, (R. 250), being 12 years of age at the time of the offense.

3. I find that the act amounted to the taking of indecent liberties with the victim.

4. I find that the accused committed the act with the intent to arouse and appeal to the lust, passions and sexual desires of the accused and the victim.

5. I find that the act was committed in the presence of the victim. (R. 259, 262)

6. I find that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the service and was of a nature to bring discredit upon the armed forces.

Charge II, Specification 4

By Elements

1. I find that at Grand Forks, AFB, N.D. in the period July-August, or early September 1985, (R. 254) the accused placed his hand on Eric Hricak's upper leg. (R. 258).

2. I find that the victim was a male person, not the spouse of the accused, under the age of 16 years, being 12 years of age at the time of the offense. (R. 250).

3. I find from the evidence of the event and the circumstances that the act of the accused was indecent.

4. I find that the accused committed the act with the intent to arouse, appeal to and gratify the lust, passions and sexual desires of the accused and the victim.

5. I find that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the service and was of a nature to bring discredit upon the armed forces.

Summation

I found the accused guilty beyond a reasonable doubt as to each and every element of each and every offense under Charge II based on the legal and competent evidence admitted and the reasonable inferences to be drawn therefrom.

/s/ CHARLES W. FOWLER
Charles W. Fowler, Colonel, USAF
Chief Circuit Military Judge

Date: 18 Feb 87

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 25865

UNITED STATES

v.

SERGEANT MICHAEL A. ORBEN, FR 293-64-9661
UNITED STATES AIR FORCE

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23 OCTOBER 1987

Sentence adjudged 11 December 1986 by GCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: Charles W. Fowler (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for one (1) year, forfeiture of all pay and allowances and reduction to airman basic.

Appellant Counsel for the Appellant: Mr. Robert J. Labine, Grand Forks, North Dakota, Colonel Leo L. Sergi and Captain Laurence M. Soybel. Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert R. Giovagnoni and Captain Jeffrey H. Curtis.

Before

HODGSON, FORAY and HOLTE
Appellate Military Judge

DECISION

Per Curiam:

The appellant was charged with one specification of sodomy with a child under the age of sixteen years in violation of Article 125, U.C.M.J. Consistent with his plea he was found not guilty of this charge. Additionally he was charged with four specifications under Article 134 U.C.M.J. Specification 1 alleged indecent acts upon a male under sixteen years of age during the period from on or about 15 September 1985 to on or about 11 January 1986; Specification 2 alleged orally communicating to a child under the age of sixteen years indecent language from on or about 1 August 1985 to about 31 October 1985; Specification 3 alleged taking indecent liberties with a male under sixteen years of age at divers times between on or about 1 July 1985 to about 31 August 1985; Specification 4 alleged committing an indecent act upon the body of a male under sixteen years of age from on or about 1 July 1985 to about 31 August 1985. Contrary to his pleas he was convicted of these charges. The sentence adjudged by the judge alone general court-martial, and approved by the convening authority, extended to a dishonorable discharge, confinement for one year, forfeiture of all pay and allowances and reduction to the grade of E-1.

On the evening prior to trial Specification 1 of Charge II was amended to enlarge the time frame of the charged acts from divers times during the period from on or about 1 October 1985 to on or about 11 January 1986 to on or about 15 September 1985 to on or about 11 January 1986. The appellant contends that this constituted a major change in violation of R.C.M. 603, resulting in an inadequate pre-trial investigation which prevented the appellant from properly preparing for trial. We disagree. The appellant had available to him long before trial a copy of the

Article 32(b) U.C.M.J. Investigation. Contained therein was the evidence used by the trial counsel to justify the amendment of the specification. In *United States v. Brown*, 16 C.M.R. 257 (C.M.A. 1954) it was held that time was not of the essence in the crime of a lewd and lascivious act and held the amendment enlarging the time frame by slightly over four months proper. We see no reason not to apply the same principle to this case. R.C.M. 603 states that a change in charges is considered to be major and requiring re-preferral if it results in a different offense or allegation of different or more serious offenses or raises substantial question as to statute of limitation or misleads the accused. *United States v. Blair*, 21 M.J. 981 (A.F.C.M.R. 1986). We find none of these factors in the case *sub judice*. A final test to be applied in a variance situation is: (1) has the accused been misled to the extent that he has been unable adequately to prepare for trial, and (2) is the accused fully protected against another prosecution for the same offense. *United States v. McCullah*, 8 M.J. 697 (A.F.C.M.R. 1980). We resolve both these factors against the appellant. Having reached these conclusions we have determined that the complained of change to the specification was minor and one not prohibited under R.C.M. 603. Therefore this allegation of error is without merit.

The next asserted error is that the language used by the appellant as alleged in Specification 2 of Charge II was not indecent under Article 134(c), U.C.M.J. We disagree. Deciding whether the language used by the appellant was indecent requires looking beyond the actual spoken words. There can be no doubt that what is indecent or obscene is not readily definable. The test to be applied in determining whether particular language is obscene is whether the particular language is calculated to corrupt morals or excite libidinous thoughts, and not whether the words themselves

are impure. *United States v. Simmons*, 27 C.M.R. 654 (A.C.M.R. 1959); *United States v. Linyear*, 3 M.J. 1027 (N.C.M.R. 1977.) In *Linyear* the court stated, "What constitutes legally punishable verbal obscenity is a relative matter which requires consideration of many diverse factors such as fluctuating community standards of morals and manners, the personal relationship existing between a given speaker and his auditor, motive, intent and probable effect to mention but a few". In response to special findings requested by appellant pursuant to R.C.M. 903 on this issue the military judge stated in part,

> I find the language was indecent, being grossly offensive to the community sense of modesty, decency or propriety. I find it shocks the moral sense because of its vulgar, filthy and disgusting nature. I find that it is particularly odious to invite a child of tender years to contemplate himself committing anal sodomy. I find language from an adult to a child of tender years, as in this case, suggesting no difference between anal sodomy and heterosexual intercourse to be dangerously indecent in that the child may dwell upon this perverted suggestion and speculate as to its merit.

We are in total agreement with this special finding. Considering all of the facts and circumstances of this case we conclude that the language was indeed indecent and decide this issue adverse to the appellant.

The appellant next complains that his conduct of displaying a non-pornographic magazine to the victim did not constitute the taking of indecent liberties in violation of Article 134, U.C.M.J. We again disagree. To resolve this issue it is unnecessary to enter into a discussion as to whether the published magazines were or were not pornographic. It is well established that a physical touching is not necessary to the offense of indecent liberties with

child. *United States v. Brown*, 3 U.S.C.M.A. 454, 13 C.M.R. 10 (1953). Although the magazines in question were not admitted into evidence, they were described as containing nude photographs of nude children of both sexes and nude women. Admittedly these pictures per se may not constitute the charged offense. However, it was the obvious intended purpose of the appellant for showing these publications to the victim that makes his conduct criminal. Prior to producing these magazines the appellant and the victim were riding in the appellant's automobile during which time the appellant repeatedely placed his hands on the inner thighs of the victim. Considering the posture of the evidence relating to the prior activity of the appellant and the fact that the *mens rea* of the offender is the gratification or arousal of sexual desires we conclude that the charged offense was in fact committed by the appellant. *United States v. Scott*, 21 M.J. 345 (C.M.A. 1986).

The final issue to be discussed is the allegation that the evidence was insufficient as a matter of law to support the findings of guilty for Specifications 3 and 4 of Charge I. Utilizing our fact finding powers authorized by Article 66, U.C.M.J. we decide this issue adverse to the appellant.

The remaining assigned errors are decided against the appellant without further comment.

We have examined the record of trial, the assignments of errors, and the government's response thereto, and have concluded that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the accused was committed. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

(SEAL)

OFFICIAL:

/s/ Pamela Howard
PAMELA HOWARD
Captain, USAF
Chief Commissioner

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